STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2007
v	No. 269426 Oakland Circuit Court
D'ANDRE DEQUAN JERNAGIN, Defendant-Appellant.	LC No. 05-204001-FC

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant and Michael Butler approached Catarino Ybarra outside a bar and demanded his money. Ybarra told the police that Butler held a handgun in the air and that defendant struck him in the face. Ybarra also told the police that he grabbed the gun, a struggle ensued, and defendant and Butler eventually fled. Shortly thereafter, a police officer noticed defendant and Butler walking southbound from the intersection where the robbery occurred. The two were arrested and the area was searched. The officer found a .25 caliber semi-automatic pistol and two baggies, each containing six rocks of crack cocaine. During defendant's booking, other officers removed a .25 caliber bullet from his pocket.

Defendant first claims on appeal that the prosecution failed to present sufficient evidence for a rational jury to find him guilty of felony firearm on an aiding and abetting theory. We review a challenge to the sufficiency of the evidence de novo to determine whether, when viewed in a light most favorable to the prosecution, the evidence presented at trial would permit a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

To support a finding that a defendant aided and abetted a felony-firearm offense, the prosecution must show: (1) the defendant or another person committed a violation of the felony-firearm statute, (2) the defendant performed acts or gave encouragement that assisted in the

commission of the felony-firearm violation, and (3) the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004). Defendant disputes only the second of these elements. Defendant contends that his mere presence with Butler at the time of the armed robbery was insufficient to establish that he performed acts that constituted aiding or abetting in the commission of felony-firearm.

Viewing the facts in a light most favorable to the prosecution, we hold that there was sufficient evidence for a jury to find that defendant assisted in the commission of the felony-firearm violation. The jury heard evidence that defendant helped Butler facilitate the robbery. Defendant and Butler approached Ybarra simultaneously and both demanded that he give them money. After Ybarra refused and Butler pulled out a gun, defendant used Butler's possession of a weapon to intimidate Ybarra. Defendant punched Ybarra while Butler pointed the firearm at him. A defendant's use of the principal's possession of a weapon to intimidate victims has been expressly recognized by our Supreme Court as a circumstance under which the aiding and abetting test is satisfied. *Moore, supra* at 71. Finally, the police found a .25 caliber bullet in defendant's pocket that matched the .25 caliber semi-automatic pistol found by the police near the crime scene. The jury could have reasonably concluded from this evidence that defendant aided and abetted Butler in the possession and use of the firearm. *Id*. From the evidence presented at trial, it was reasonable for the jury to conclude that defendant performed acts that assisted in the commission of the felony-firearm violation.

Defendant next argues that the prosecutor committed misconduct when he introduced the issue of narcotics. Defendant asserts that the evidence had no relevance to the prosecution's case and was only introduced to prejudice him. Because defendant failed to specifically object to the alleged misconduct at trial, our review is limited to determining whether defendant has demonstrated plain error affecting his substantial rights. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id*.

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Nor may a prosecutor intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). However, the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id*. at 282.

Here, the prosecutor's theory of the case was that defendant assisted Butler in the armed robbery of Ybarra, and that defendant and Butler discarded the weapon south of the crime scene. In light of this theory, it was reasonable for the prosecutor to mention and elicit testimony regarding the drugs found near the crime scene as it related to the police officer's search of the area and the discovery of the weapon.

But the prosecutor's attempt to introduce into evidence the two baggies of cocaine borders on injecting evidence into trial that he knew was inadmissible. A lawyer may not

knowingly offer inadmissible evidence. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). The prosecutor admitted in his opening statement that the cocaine was not relevant to the case. Regardless, the prosecutor attempted to admit the drugs into evidence. Nevertheless, any error in this regard was cured by the prosecution's decision to withdraw his motion to admit the cocaine, stating that it was not relevant, and the trial court's instruction to the jury not to consider evidence the court had excluded when deciding the case. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, the prosecution's false statement in front of the jury that the cocaine was received into evidence was unsupported by the evidence. Although untrue, this comment did not affect the outcome of the trial or the fairness of the judicial proceeding because the trial court instructed the jury that it should disregard any argument that was not supported by evidence at trial. See *People v Curry*, 175 Mich App 33, 44-45; 437 NW2d 310 (1989). Further, the court explicitly instructed the jury that it must decide the case on admitted evidence, and that the attorneys' statements and arguments were not evidence. Again, the jurors are presumed to follow their instructions. *Graves*, *supra* at 486. No plain error occurred. Accordingly, defendant is not entitled to the reversal of his convictions on this basis.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio